IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

THURSDAY, THE FOURTEENTH DAY OF OCTOBER
TWO THOUSAND AND FOUR

PRESENT

-

THE HON'BLE MS. JUSTICE G.ROHINI

WRIT PETITION NO.11022 OF 2004

AND

WRIT PETITION NO.11036 OF 2004

-

WRIT PETITION NO : 11022 of 2004

Between:

Enen Electrical Engineers (P)Ltd., D.No.11-1-474-1, Aravinda Nagar,Anantapur, rep. by its Partner, Siddappa Kantha Raju,

S/o K. Siddappa.

..... PETITIONER

AND

The Chief Engineer, Construction, Vidyuth Soudha, AP Transco,Hyderabad.

.....RESPONDENT

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ, or order or direction more particularly in the nature of writ of mandamus declaring the action of respondent No.1 in rejecting the pre-qualifications bid of the petitioner organization vide proceedings dated 24-06-2004 as unconstitutional and direct the respondent No.1 to consider the price bid of the petitioner for the work of erection of 220/132 KV Substation at Kalyandurg (Ananthapur dist) and 220 KV Bay

towers at Ananthapur sub station after setting aide the proceedings dt.24-6-2004 by R1.

Counsel for the Petitioner :MR. K.S.MURTHY

Counsel for the Respondent: SMT.M.VINOBHA DEVI, Standing Counsel for A.P. Transco

-

-

-

-

-

-

-

-

-

-

-

WRIT PETITION NO : 11036 of 2004

Between:

Enen Electrical Engineers (P)Ltd., D.No.11-1-474-1,Aravinda Nagar, Anantapur, rep. by its Partner, Siddappa Kantha Raju,

S/o K. Siddappa.

.

..... PETITIONER

AND

1 The Chief Engineer, Construction,Vidyuth Soudha,AP Transco, Hyderabad.
2 Nitin Sai Constructions, 406, 6th floor, Srinilaya Enclave, Ameerpet, Hyderabad, rep. by its Managing Partner.

.....RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a writ, or order or direction more particularly in the nature of writ of mandamus declaring the action of respondent No.1 in rejecting the pre-qualifications bid of the petitioner organization vide proceedings dated 24-06-2004 as unconstitutional and

direct the respondent No.1 to consider the price bid of the petitioner for the work of erection of 33 KV Towers at 220 K Substation Gudivada after setting aide the proceedings dt.24-6-2004 by R1.

Counsel for the Petitioner :MR. K.S.MURTHY

Counsel for the Respondent No.1: SMT.M.VINOBHA DEVI, SC for AP Transo

Counsel for the Respondent No.2 : ---

The Court at the stage of admission made the following :

THE HON'BLE MS. JUSTICE G.ROHINI

WRIT PETITION NO.11022 OF 2004

AND

WRIT PETITION NO.11036 OF 2004

COMMON ORDER :

Since common questions of fact and law arise for consideration, these two writ petitions are heard together and decided by this common order.

The petitioner in both the writ petitions is M/s.ENEN Electrical Engineers Private Limited, Anantapur which claims to be a registered Grade-A Contractor. These two writ petitions are filed aggrieved by the action of the Chief Engineer (Construction), Vidyut Soudha, A.P. Transco, Hyderabad in rejecting pre-qualification bid offered by the petitioner in response to the Tender Specifications APT-26/2004 and APT-22/2004 issued by the Transmission Corporation of A.P. Limited (for short, ' the Transco).

Under the aforesaid two Tender Specifications, the Transco invited tenders for Erection of 220/132 kv sub-station at Kalyandurg and Erection of 33 kv Features at Gudivada respectively. The petitioner firm has submitted the pre-qualification bids in respect of the both the aforesaid works. However, under the impugned proceedings dated 24-06-2004 issued by the Chief Engineer, A.P. Transco, Hyderabad, the price bid of the petitioner in respect of specification No.APT-26/2004 was returned unopened on the ground of poor performance of the work done by the petitioner. The Bid Security furnished by the petitioner was also returned. Similarly the price bid in respect of Specification No.APT-22/2004 was also returned under a separate letter dated 24-06-2004 stating that the petitioner is not meeting the qualification requirements as per Clause No.17 of the qualification criteria under general terms and conditions stipulated in the tender specification. The said two letters dated 24-06-2004 are questioned in W.P.NOs.11022 and 11036 of 2004 respectively.

The main contention of the petitioner in both the writ petitions is that the ground on which the bids of the petitioner were returned does not stand the scrutiny of reasonableness since the petitioner is a Class-A contractor having successfully completed number of projects of Central and State Governments as well as public sector and private sector undertakings apart from twelve major works for the erstwhile A.P.S.E.B. and Transco and various Transmission Companies. It is stated that though the petitioner sent a detailed representation protesting against the impugned proceedings which were passed without application of mind to the qualifications and experience possessed by the petitioner, there was no response. Hence, these writ petitions seeking a declaration that the action of the Chief Engineer, A.P. Transco in rejecting the pre-qualification bids of the petitioner is arbitrary, illegal and unconstitutional.

On behalf of the Transco, separate counter-affidavits have been filed by the Chief Engineer (Construction), A.P.Transco stating that the pre-qualification bids were opened under the two Specifications on 11-05-2004 and 25-05-2004 respectively. So far as the bids submitted by the petitioner, it was found that the petitioner who has been awarded the work earlier for construction of 220 kv sub-station at Gudivada and Bhimavaram has not completed the work and its performance was poor as the work could not be completed much beyond the stipulated period. Therefore, the petitioner's bids were rejected. The plea of the petitioner that all the works executed earlier by it were upto the satisfaction of the concerned authorities has been denied and it is stated that two works namely erection of 220/132 KV sub-station at Gudivada under contract No.RC-3110, dt. 19-11-2001 and work under contract No.RC/3102, dt. 17-11-2001 have not been completed so far though the said works were supposed to be completed by 01-09-2002 and 15-03-2003. Similarly, erection of sub-station at Khambampadu under Contract No.RC-3337, dt.4-7-2003 also has not been completed though the work was scheduled to be completed on or before 21-04-2004. It is further stated that after opening the pre-qualification bids of all the tenderers, the bids received were analysed against the qualification criteria prescribed in the specifications and it was noted that in spite of several opportunities given the petitioner could not complete the works awarded earlier. Since the past performance of the petitioner is not satisfactory, its price bids were not considered and the same were returned. The

allegation of the petitioner that the assessment was done by lower level staff of the respondent office has been denied and it is stated that on an analysis of the bids received, the decision on the pre-qualification bids has been taken by the Board of Directors consisting of Director (Project Construction), Director (Finance), Director (TR. & Go.), Director (RA & Co-ordination) as per the standing regulations and practices of A.P. Transco.

The petitioner filed a reply-affidavit disputing the version of the respondents that the previous works entrusted to the petitioner have not been completed. It is stated that as a matter of fact the work at Kambampadu has already been completed and it was actually charged on 8-7-2004. It is further stated that the declaration made by the technical committee that the performance of the petitioner was very poor was done behind the back of the petitioner and without taking into the consideration the ground realities which amounts to black-listing the party and it is in violation of the principles of natural justice. Various details have been furnished to substantiate the plea of the petitioner that there was no default on their part in executing the previous works entrusted to them within the specified time.

Thereafter, the Chief Engineer, A.P. Transco filed additional counter-affidavits stating that the pre-qualification bids have to be analysed by taking into consideration the works executed and also the works on hand by the bidders. The Technical Committee having analysed the works carried out by the petitioner at Bhimavaram & Gudivada found that the past performance of the petitioner is very poor since they could not improve in spite of several notices and reminders and also could not keep up the programme for completion of works as fixed in the review meetings held on 03-01-2002 and 31-07-2002 and accordingly it was decided that it is not entitled for award of the works in question.

I have heard Sri K.S. Murthy, the learned Counsel for the petitioner and Smt. M.Vinobha Devi, the learned Standing Counsel for A.P. Transco and perused the material on record.

The learned Counsel for the petitioner contends that the impugned orders of rejection which are based on vague assumptions and without properly assessing the technical issues are unsustainable. The learned Counsel vehemently contends that the alleged poor performance of earlier works awarded to the petitioner is factually incorrect and therefore the same cannot be a ground for rejection of the present works. He submits that since the works in question have not yet been commenced, it would be appropriate to direct reevaluation of the pre-qualification bids of the petitioner in respect of both the works by a team of more qualified senior persons.

On the other hand, the learned Counsel for the respondent contends that the bids received were analysed by a Technical Committee strictly in accordance with the procedure prescribed and the price bids of the petitioner were rightly rejected since the past performance of the petitioner was found to be poor and the writ petitions are misconceived and liable to be dismissed in limini.

In the light of the respective pleadings and the submissions made by the learned Counsel for both the parties, the only question that arises for consideration is whether the impugned action of the respondents in rejecting the bids of the petitioner in respect of the two works in question suffers from any infirmity warranting interference by this Court.

It is not in dispute that as per the Specifications in question issued by the A.P. Transco inviting bids for the two works in question, the bidders are required to submit the bids in two parts viz., (1) part-A pre-qualification bid and (2) Part-B price bid, in separate sealed covers put in a single cover. While opening the bids, the pre-qualification bid will be opened first on the date notified for opening the bids and in case qualification, experience and other requirements are found to be adequate, then the cover containing price-bid will be opened on a subsequent date notified to the qualified bidders. It is also clear from clause-9(a) of the Specifications that if the qualification, experience and other requirements are found to be inadequate, the cover containing the price bid of such an unqualified bidder will be returned unopened.

As per clause-11, the pre-qualification bid shall contain the details of other works tendered for and the works on hand as on the date of submission of the bid in the format prescribed in Schedule-V. It is also relevant to note that clause-17 which provides for "qualifying criteria for the bidder" provides that so far as the financial turnover is concerned, the bidder should produce evidence of a minimum annual financial turnover equivalent to the quoted value of the work in any one financial year during the last five financial years preceding the date of bid opening. It further provides as under:

"The statement showing the value of existing commitments and on going works as well as the stipulated period of completion remaining for each of works listed should be issued by the Engineer-in-charge of the Department/Undertaking not below the rank of Executive Engineer or equivalent and countersigned by the rank of Superintending Engineer or equivalent. The statement to the above effect will be clearly enclosed to the bidding document, and the bidder shall furnish the particulars invariably in the same format failing which the tender shall be treated as incomplete and summarily rejected."

Thus, it is clear that while assessing the pre-qualification bid the eligibility of the bidder has to be assessed on the basis of performance of earlier works. The Schedule-V requires that the bidder has to produce the details of work on hand as well as the work tendered for together with the certificate issued by the Engineer-in-charge of the Department / Undertaking in support of the said information. Thus, undoubtedly, the past performance of the bidder is one of the essential ingredients to be taken into consideration. It is not in dispute that the Technical Committee which is an expert body did assess the performance of the petitioner in respect of earlier works awarded and on the basis of the decision of the said Expert Body the impugned letters of rejection were issued. Hence, I am unable to accept the contention of the petitioner that the said decision was on vague assumptions and arbitrary. I am also unable to accept the contention of the learned Counsel for the petitioner that the rejection of the petitioner's bid on the ground of poor performance of the earlier works entrusted to them amounts to black-listing and therefore the petitioner ought to have been afforded an opportunity before taking the impugned decision. So far as the works in question are concerned, the respondent opined that the petitioner did not satisfy the eligibility criteria. Hence, the contention that the

petitioner is black-listed is without any substance.

It is a settled principle of law that the right to choose cannot be considered to be an arbitrary power as long as the said power is not exercised for any collateral purpose. It is also a settled principle of law that the contractual matters are not justiciable and they need judicial intervention only in case of unfairness. As held by the Supreme Court in TATA CELLULAR vs. UNION OF INDIA the Government must have freedom of contract and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. The decision must not only be tested by the application of Wednesbury Principle of reasonableness, but must be free from arbitrariness not affected by bias or actuated by mala fides. The Supreme Court also observed that the Court will intervene only where the facts taken as a whole could not logically warrant the conclusion of the decision maker and that if the weight of the facts pointing to one course of action is overwhelming, then a decision the other way cannot be upheld.

As can be seen from the pleadings of the petitioner, the only contention raised is that the decision of the respondents that the past performance of the petitioner is poor is incorrect and at any rate the same cannot be a ground for rejecting the price-bid. As already noted above, the performance of the petitioner was analysed and assessed by an expert body consisting of Director (Project Construction), Director (Finance), Director (TR. & Go.), Director (RA & Co-ordination) as per the standing regulations and practices of A.P. Transco. It is neither possible nor permissible for this Court to go into the correctness of the said decision taken by the Expert Body. This Court while exercising the jurisdiction under Article 226 of the Constitution of India does not sit in judgment as an appellate authority over the decision taken by the experts in the field.

It is also relevant to note that there is absolutely no allegation of mala fides against any of the officers of the A.P. Transco. The law is well settled that the scope of judicial review by this Court in the matters of awarding contracts is restricted and this Court will interfere only where the decision making process is vitiated by mala fides, unreasonableness or arbitrary exercise of power. In the case on hand, none of the

said grounds are made out to hold that the impugned action of the A.P. Transco in rejecting the price bids of the petitioner is arbitrary or illegal.

For the aforesaid reasons, the matter does not warrant interference under Article 226 of the Constitution of India.

Accordingly both the writ petitions are dismissed. No costs.

Needless to mention that the interim order granted pending the writ petitions shall stand vacated.

_____

14th October, 2004.

-

-

Note:- Office is directed to put up a copy

of this order in W.P.No.11036/2004

After signatures.

(B/O)

gbs

To

1.The Chief Engineer, Construction, Vidyuth Soudha, AP Transco,Hyderabad.

2.2CD copies